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No. 85-_____

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

NATIONAL DISTILLERS &
CHEMICAL CORPORATION,

Petitioner,

v.

PATRICIA L. PRATT,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. The proliferation of diversity actions brought by injured employees alleging intentional torts committed by their employers raises a critical dispositive question regarding *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64 (1938), and the propriety of the federal forum, to wit: Should an injured employee who has received worker's compensation by claiming that his injuries were accidental be estopped from pursuing an intentional tort action in federal court against his employer on the theory that precisely the same injuries were intentionally caused?

2. Is a corporation that is a complying, self-insured employer under state worker's compensation laws deprived of due process of law and equal protection of the laws when:

(a) the corporation is required to pay in excess of 100% compensation to an injured employee as non-punitive damages for an intentional tort?

(b) the corporation is required to pay more in damages to an employee that it injures as a result of an intentional tort than would a non-complying corporate employer, or than a complying state fund insured corporate employer, or than an individual tortfeasor?

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NATIONAL DISTILLERS &
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v.

PATRICIA L. PRATT,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner respectfully requests that this Court issue a writ of certiorari to review the decision and judgment of the United States Court of Appeals for the Sixth Circuit entered on May 9, 1985, which vacated the decision of the United States District Court for the Southern District of Ohio granting summary judgment in favor of the Petitioner.[1]

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[1] Pursuant to Rule 28.1 of the United States Supreme Court Rules, Petitioner National Distillers & Chemical Corporation provides the following list of its non-wholly owned subsidiaries and affiliates: Battleground Water Distribution Company; Caves Laurent Perrier, Inc.; Cetus Corporation; John de Kuyper & Son, Incorporated; Lifecodes Corporation; ND Liquors (UK) Limited; National Distillers Products Europe S.r.1.; Poliolefinas S.A.; National Helium Corporation; Quimic S.A. de C.V.; RMI Company; and Syngas Company.

OPINIONS BELOW

The opinion of the Court of Appeals is contained in the Appendix at 1A-3A.[2] The opinion of the District Court granting summary judgment is contained in the Appendix at 5A-9A.

JURISDICTION

The judgment of the Court of Appeals was entered on May 9, 1985. (1A) This Court has jurisdiction to review the judgment of the Court of Appeals by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the due process clause of the Fifth Amendment to the United States Constitution and the equal protection clause of the Fourteenth Amendment to the United States Constitution. The verbatim text of these provisions is contained in the Appendix at 10A.

STATEMENT OF THE CASE

Petitioner National Distillers & Chemical Corporation ("National Distillers") operates a chemical manufacturing and processing plant in Cincinnati, Ohio. On February 18, 1982, Paul Pratt, the husband of Respondent Patricia L. Pratt, was employed in National Distillers' plant in Cincinnati as a chemical process operator. At approximately 9:15 A.M. on that date, an explosion occurred in Building 56 at National Distillers' plant. Mr. Pratt was injured and burned as a result of the explosion. He died as a result of those injuries on March 26, 1982.

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[2] References to the Appendix are cited herein as "____A".

National Distillers is a self-insured employer under Ohio's worker's compensation system and is in full compliance with each of its provisions. On February 22, 1982, an application for worker's compensation benefits was filed on behalf of Mr. Pratt. National Distillers did not contest the application and, in fact, certified it for payment of full benefits.

Prior to Mr. Pratt's death, National Distillers paid him the maximum allowable worker's compensation benefits of $298 per week plus payment of his medical expenses. Subsequent to his death, National Distillers paid Mrs. Pratt the maximum allowable amount for funeral expenses of $1,200 and the maximum allowable death benefits of $298 per week. Mr. and Mrs. Pratt accepted all of the worker's compensation benefits paid by National Distillers without protest or qualification.

Inherent in the award of worker's compensation is a finding that the occurrence was accidental and within the scope of Mr. Pratt's employment. Nevertheless, on February 17, 1983, Mrs. Pratt filed a 9-count complaint against National Distillers in the United States District Court for the Southern District of Ohio. Jurisdiction was based on diversity of citizenship under 28 U.S.C. §,1332. The complaint alleges that Mr. Pratt's injuries and death were not accidental, but rather were the results of intentional tortious acts by National Distillers.

On October 31, 1983, National Distillers moved for summary judgment based on the undisputed fact that Mrs. Pratt had previously sought and received worker's compensation benefits for those same injuries. On February 22, 1984, Chief Judge Carl B. Rubin entered an order granting National Distillers' motion and dismissing the complaint. (5A) Judge Rubin held that Mrs. Pratt could not accept worker's compensation payments and then later allege that those same injuries were not accidental but rather were intentionally caused by National Distillers.

On appeal, the United States Court of Appeals for the

Sixth Circuit held the case in abeyance for several months pending a decision by the Ohio Supreme Court on related state law questions arising out of litigation totally unrelated to this action. (4A) On May 9, 1985, the Sixth Circuit vacated Judge Rubin's judgment sua sponte and remanded the case for further proceedings in light of *Jones* v. *VIP Development Co.*, 15 Ohio St. 3d 90, 472 N.E.2d 1046 (1984). (1A) The Sixth Circuit refused to allow National Distillers to fully brief the constitutional and estoppel questions that are presented in this petition.

REASONS FOR GRANTING THE WRIT

This case uniquely presents two important federal issues arising from the deluge of intentional tort diversity actions filed by injured employees against their employers in conjunction with state worker's compensation proceedings. This juxtaposition of the federal and state systems has resulted in the subordination of vital federal constitutional and judicial principles to state interests. The elevation of state interests to such a superior position is not required by *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64 (1938), or by any other body of law.

This confrontation manifests itself in two ways. First, federal principles preclude plaintiffs from suing on claims that are diametrically opposed to ones they previously litigated, especially when they won previously. However, state principles would require federal courts to endorse such a jurisprudential charade through the procedural guise of diversity jurisdiction. Second, federal constitutional principles hold a tortfeasor liable to pay an injured party full and just compensation, but no more. State principles, though, would require federal courts to award damages in excess of 100% compensation without any punitive damages. Each of these issues requires review by this Court and is discussed in greater detail below.

I. THE SIXTH CIRCUIT'S DECISION IMPROPERLY PERMITS PLAINTIFFS TO PURSUE DIVERSITY ACTIONS IN FEDERAL COURTS BY CONTRADICTING POSITIONS TAKEN IN STATE WORKER'S COMPENSATION PROCEEDINGS

The first area of conflict involves whether federal estoppel principles designed to protect the integrity of the courts must be subordinated to contrary state interests merely by creating federal jurisdiction through diversity of citizenship. Federal courts do not permit relitigation of matters conclusively decided in earlier proceedings nor do they permit parties to advocate positions contrary to those previously taken. The impact of the Sixth Circuit's decision is to cast aside those well-established principles.

Res judicata prevents relitigation of a claim that has been finally decided in an earlier proceeding. *Baltimore Steamship Co.* v. *Phillips*, 274 U.S. 316 (1927). The principle of collateral estoppel precludes a party from relitigating a question of fact which was put in issue and conclusively determined against it, where that party had a full and fair opportunity to litigate the issue in a prior action. Collateral estoppel is designed to, among other things, foster reliance on adjudications by preventing inconsistent decisions. *Allen* v. *McCurry*, 449 U.S. 90, 94-95 (1980); *Montana* v. *United States*, 440 U.S. 147, 153-54 (1979). Collateral estoppel does not require identity between the parties in the instant and prior suits. *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U.S. 313 (1971).

In addition to these principles, federal courts rely upon equitable and judicial estoppel to preserve the integrity of the federal judiciary. Equitable estoppel precludes a party from litigating, in a second proceeding, claims that are clearly inconsistent with those litigated in an earlier proceeding where the opposing party has detrimentally relied upon his opponent's prior position. This is especially true where the party

successfully asserts the initial position and accepts the benefits that flow from it. The rule is designed to promote the consistency and fair dealing essential to the proper operation of the judicial system. *See Davis* v. *Wakelee,* 156 U.S. 680, 689-92 (1895).

Judicial estoppel prevents a party who has successfully asserted a position in an earlier judicial or administrative proceeding from asserting an inconsistent position in a subsequent proceeding. Unlike equitable estoppel, however, judicial estoppel does not require privity or detrimental reliance by the opposing party. Judicial estoppel is designed to protect the integrity of the judicial process which is undermined by litigants who pursue contradictory positions. *Edwards* v. *Aetna Life Insurance Co.,* 690 F.2d 595, 598-99 (6th Cir. 1982).

The effect of the Sixth Circuit's decision is to render these principles a nullity by elevating state law to a superior position. In addition, the Sixth Circuit's decision sharpens the conflict between the circuits on the applicability of federal or state law to estoppel issues. Finally, this decision evidences the circuits' need for guidance from this Court on the unresolved issues left in the wake of this Court's series of collateral estoppel decisions.

In Ohio, the administrative process of adjudicating worker's compensation claims includes a determination that the injury was accidental and within the scope of employment. The Ohio Supreme Court in *Blankenship* v. *Cincinnati Milacron Chemicals, Inc* . 69 Ohio St. 608, 433 N.E.2d 572, *cert. denied,* 459 U.S. 857 (1982), distinguished intentional tortious injuries because they are, by definition, outside the scope of employment.

National Distillers obtained a summary judgment on the basis that Mrs Pratt could not accept worker's compensation and then sue for an intentional tort. *See* Ohio Constitution, Article II, Section 35 (10A); Ohio Revised Code Section 4123.74. (10A) The Sixth Circuit vacated that judgment on

the basis of *Jones* v. *VIP Development Co.*, 15 Ohio St. 3d 90, 472 N.E.2d 1046 (1984). *Jones* permitted worker's compensation recipients to pursue intentional tort claims, and specifically ruled that Ohio principles of res judicata and collateral estoppel (which require mutuality) are not bars. 15 Ohio St. 3d at 99-100. While the *Jones* Court did not specifically address equitable and judicial estoppel, the effect of the Sixth Circuit's decision is to require a trial on the intentional tort claim notwithstanding Mrs. Pratt's acceptance of worker's compensation.

The fundamental misconception in the Sixth Circuit's opinion is the need to adhere to state law. Nothing in *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64 (1938), requires blind allegiance to state principles of res judicata and collateral estoppel. These matters are so intricately tied to the operation of the federal judiciary as to require federal control.

Some circuit courts have ruled that the federal principles of res judicata and collateral estoppel control in diversity actions. *Kern* v. *Hettinger*, 303 F.2d 333 (2d Cir. 1962); *Commercial Box & Lumber Co.* v. *Uniroyal, Inc.*, 623 F.2d 371 (5th Cir. 1975) (where original action filed in federal court); *Clay* v. *Johns-Manville Sales Corp.*, 722 F.2d 1289, 1295-96 (6th Cir. 1983), *cert. denied*, 104 S. Ct. 3537 (1984). Other circuits take the contrary view that state law principles must control in diversity actions. *Schneider* v. *Lockheed Aircraft Corp.*, 658 F.2d 835, 851 n.17 (D.C. Cir. 1981); *Donegal Steel Foundry Co.* v. *Accurate Products Co.*, 516 F.2d 583, 587 (3d Cir. 1975).

The Sixth Circuit perhaps best exemplifies the rampant confusion among the circuit courts on the federal versus state law question. It has made numerous recent rulings adhering to federal law. *Clay* v. *Johns-Manville Sales Corp.*, *supra*; *Patrick* v. *South Central Bell Telephone Co.*, 641 F.2d 1192, 1198-99 (6th Cir. 1980); *Westwood Chemical Co.* v. *Kulick*, 656 F.2d 1224 (6th Cir. 1981). *See also Harrison* v. *Celotex Corp.*, 583 F. Supp. 1497, 1498-1502 (E.D. Tenn. 1984). Re-

gardless of whether the Sixth Circuit's decision in this case signifies a change in its position, it highlights the increasingly obvious fact that the circuits are adrift and in need of Supreme Court guidance. In any event, there is clearly a sharp division between the circuits that must be resolved.

The logic behind the application of federal law in these diversity actions is inescapable and was best stated by the Second Circuit in *Kern, supra,* with respect to res judicata:

> It would be destructive of the basic principles of the Federal Rules of Civil Procedure to say that the effect of a judgment of a federal court was governed by the law of the state where the court sits simply because the source of federal jurisdiction is diversity. The rights and obligations of the parties are fixed by state law. These may be created, modified and enforced by the state acting through its own judicial establishment. But we think it would be strange doctrine to allow a state to nullify the judgments of federal courts constitutionally established and given power also to enforce state created rights. The Erie doctrine [citation omitted] is not applicable here.

303 F.2d at 340. The inherent power of the federal judiciary to determine the propriety of actions in its courts is in no way weakened when the original action was filed in a state forum.

It is clear that federal principles of res judicata and collateral estoppel should preclude Mrs. Pratt from pursuing the intentional tort claim against National Distillers. Although mutuality is not a requirement, both National Distillers and Mrs. Pratt were parties to the prior worker's compensation proceeding. The award of worker's compensation, by definition, includes a determination that the incident was accidental. This ruling sets up a classic res judicata/collateral estoppel situation in which that prior determination should be deemed binding in subsequent federal court litigation. Therefore, this Court should review this case to resolve the conflict in

the circuits concerning the use of federal or state principles of res judicata and collateral estoppel in diversity actions.

Equally compelling is the need to examine the issues involving equitable and judicial estoppel. To permit this case to proceed is to endorse plaintiff's taking one position in state proceedings and later directly contradicting it in federal proceedings, only to have the federal judge's hands tied because diversity jurisdiction exists. This situation is intolerable and should not be sanctioned merely because of differing domiciles.

Once again, there is sharp division between the circuits on the applicability of federal or state law to these estoppel issues. The Sixth Circuit has previously ruled that federal law of judicial estoppel applies in diversity actions. *Edwards* v. *Aetna Life Insurance Co.*, 690 F.2d 595 (6th Cir. 1982). However, in *Konstantinidis* v. *Chen*, 626 F.2d 933 (D.C. Cir. 1980), the court ruled that state law of judicial and equitable estoppel must be applied under the *Erie* doctrine.

Just as with res judicata and collateral estoppel, there is no reason to subordinate federal interests to state law on these estoppel issues. Indeed, because judicial and equitable estoppel are explicitly designed to protect the integrity of the federal judiciary, there is even greater reason to follow federal law. To do otherwise is to emasculate this principle in the vast bulk of federal court litigation.

There is no greater harmony among the circuit courts on whether the acceptance of worker's compensation should bar a subsequent inconsistent action. The application of judicial estoppel in the worker's compensation context is best evidenced by *Smith* v. *Montgomery Ward & Co.*, 388 F.2d 291 (6th Cir.), *cert. denied*, 393 U.S. 871 (1968). In *Smith*, plaintiff was awarded worker's compensation but later brought a personal injury action against his employer for the same injuries claiming that they were caused by an altercation he had with private detectives retained by the company. The Sixth Circuit affirmed the dismissal of the case based upon

judicial estoppel because plaintiff's claims were so totally inconsistent with the position he took in the worker's compensation proceeding. *See also Barrera* v. *Roscoe, Snyder & Pacific Railway Co.*, 385 F. Supp. 455 (N.D. Tex. 1973), *aff'd. mem.*, 503 F.2d 1058 (5th Cir. 1974).

Other circuit courts, though, have permitted suits to proceed for a variety of reasons notwithstanding the prior acceptance of worker's compensation. *Konstantinidis* v. *Chen, supra*; *Gleason* v. *United States*, 458 F.2d 171 (3rd Cir. 1972); *DeShong* v. *Seaboard Coast Line Railroad Co.*, 737 F.2d 1520 (11th Cir. 1984).

In this case, it is clear that plaintiff should be equitably and judicially estopped from pursuing her intentional tort claims against National Distillers. By applying for and accepting worker's compensation, plaintiff represented that Mr. Pratt's injuries and death were accidental and within the scope of his employment. Conversely, under the Ohio Supreme Court's definition in *Blankenship*, by filing an intentional tort action, she is now claiming that those same injuries were intentional and occurred outside the scope of Mr. Pratt's employment.

The inherent inconsistency in these positions is manifest. Simply stated, an injury is either accidental or it is not. It is never both. As a matter of a judicial integrity, federal courts cannot approve the pursuit of such inconsistent positions. To do so is to invite an ever increasing torrent of such claims extending far beyond intentional tort litigation. Even more so, the federal courts must not sit idly by while their integrity is impugned by unpalatable state principles merely because diversity jurisdiction exists. For that reason, this Court should review this case to reinforce the independence of the federal judiciary.

II. THE SIXTH CIRCUIT'S DECISION UNCONSTITUTIONALLY DEPRIVES COMPLYING, SELF-INSURED WORKER'S COMPENSATION EMPLOYERS OF DUE PROCESS AND EQUAL PROTECTION BY REQUIRING PAYMENT OF EXCESSIVE DAMAGES TO PLAINTIFFS

The most fundamental principle in awarding compensatory damages to an injured plaintiff is that he is entitled to be compensated in an amount that will make him whole. The primary object is to award full and adequate compensation for the wrong inflicted on him. The defendant is liable to the plaintiff for such damages but cannot be required to compensate the plaintiff in excess of that amount.[3]

This basic tenet of American jurisprudence has been expressed in United States Supreme Court decisions for many years. *Baltimore Steamship Co.* v. *Phillips,* 274 U.S. 316 (1927); *Vicksburg and Meridian Railroad Co.* v. *Putnam,* 118 U.S. 545 (1886); *Milwaukee and St. Paul Railway Co.* v. *Arms,* 91 U.S. 489 (1876). This principle of compensatory damages applies not only to personal injury actions but also to other common law and statutorily created actions. *Carey* v. *Piphus,* 435 U.S. 247 (1978); *Illinois Central Railroad Co.* v. *Crail,* 281 U.S. 57 (1930).

The jury is vested with the discretion to determine the dollar amount that constitutes full and just compensation for the injured plaintiff. The jury verdict sets the outer limit of the defendant's liability and establishes the compensation level at which the plaintiff is deemed whole. Thus, the federal principles recognize that the defendant has committed one wrong

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[3] An obvious exception to this rule is an award of punitive damages. *See Milwaukee and St. Paul Railway Co.* v. *Arms,* 91 U.S. 489 (1876). However, the constitutional issue raised here involves *only* compensatory damages and worker's compensation benefits, notwithstanding plaintiff's prayer for punitive damages in this case.

and that the plaintiff is thereby entitled to one full recovery, but no more.

Notwithstanding this principle, the collateral source rule operates as an exception to allow the injured plaintiff to receive other compensation in addition to that paid by the defendant. The theory underlying the collateral source rule is as elementary as that prohibiting double recoveries — a wrongdoer cannot claim the benefit of a contract of insurance held by the injured party. This theory was succinctly stated by this Court in *The "Atlas"*, 93 U.S. 302, 310 (1876):

> None can recover compensation twice in respect of the same injury; but what the plaintiff recovers under his policy of insurance is not compensation for damages, but a payment under a contract independent of the claim against the wrong-doer; and the better opinion is, that the principle which excludes double compensation does not strictly apply to obligations not in the same right.

While paying lip service to these tautological principles, the Ohio Supreme Court would have federal courts subvert these rules in intentional tort cases involving worker's compensation. In *Pryor* v. *Webber*, 23 Ohio St. 2d 104, 263 N.E.2d 235 (1970), the Ohio Supreme Court held:

> In Ohio, as elsewhere, it is a rule of universal application in a tort action, that the measure of damages is that which will compensate and make the plaintiff whole.

23 Ohio St. 2d at 107. Likewise, *Pryor* evidences Ohio's continuing adherence to the collateral source rule:

> The collateral source rule has been defined as "the judicial refusal to credit to the benefit of the wrongdoer money or services received in reparation of the injury caused which emanates from sources other than the wrongdoer."

23 Ohio St. 2d at 107.

The collateral source rule in worker's compensation cases developed in situations involving defendants who were third-party tortfeasors, not employers. It is clear in Ohio that an injured employee may not only obtain worker's compensation but may also seek compensatory damages from a third-party tortfeasor. In such situations, the worker's compensation benefits are deemed to be a collateral source:

> [T]he compensation provided by the workmen's compensation law is in the nature of an occupational insurance, and, like general insurance, cannot be deducted and treated as an offset for claims for damages for wrongful injury or death.

Trumbull Cliffs Furnace Co. v. *Shachovsky*, 111 Ohio St. 791, 796-97, 146 N.E. 306 (1924).

In cases involving intentional tort claims by injured employees against their employers, though, the defendant from whom compensatory damages are sought is not a third-party tortfeasor. In *Jones* v. *VIP Development Co.*, 15 Ohio St. 3d 90, 472 N.E.2d 1046 (1984), the Ohio Supreme Court discussed whether an injured employee's receipt of worker's compensation in addition to compensatory damages for an intentional tort constituted a "double recovery."[4] *Jones* relied upon *Trumbull Cliffs Furnace Co.* to the effect that a set-off of the worker's compensation award against the jury award of compensatory damages was not proper under the collateral source rule. In addition, *Jones* concluded that a double recovery did not exist because the common law award was a supplement to worker's compensation and served a punitive function not otherwise available under worker's compensation.

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[4] To speak of a "double recovery" in this context is a misnomer. Plaintiff would not receive a 200% recovery. By definition, the common law jury award provides 100% compensation. Thus, plaintiff would be made more than whole to the extent of the worker's compensation award.

The impact of applying Ohio law as interpreted by *Jones* in this federal proceeding is simple – National Distillers would be forced to pay 100% compensation to plaintiff as compensatory damages and also pay further amounts as worker's compensation. Such an award of damages to plaintiff in this case for an intentional tort without a set-off of worker's compensation is unconstitutional.[5] The critical distinction involving a self-insured worker's compensation employer[6] destroys the theoretical underpinnings of the collateral source rule and makes its application here unconstitutional.

In this case there is no collateral source. Both the worker's compensation award and any damages for an intentional tort would be paid *directly* by the same entity – National Distillers. Here the necessary independence between the collateral source and the alleged wrongdoer is absent. There is complete identity between a self-insured employer and the intentional tort defendant. Thus, the failure to allow a set-off would require National Distillers to pay compensatory damages to plaintiff in excess of 100% of the injuries sustained by plaintiff.

To require a defendant to pay compensation in excess of 100% (without an *express* award of punitive damages) violates National Distillers' right to due process of law. United States Constitution, Fifth Amendment. The award of such excessive damages beyond that required to compensate an injured party is an unconstitutional taking of National Dis-

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[5] In addition, *Jones* suggests that an award of *compensatory* damages can supplant *punitive* damages to serve as a punishment of an employer. The more stringent legal standards for proving punitive damages cannot be ignored.

[6] Ohio's worker's compensation system permits employers to comply by either contributing to the state insurance fund or by being self-insured. Non-complying employers are subject to the penalties and provisions of Ohio Revised Code Sections 4123.75 and 4123.77. (11A-14A)

tillers' property. Such a deprivation of property is clearly prohibited.

This is consistent with this Court's ruling in *Baltimore Steamship Co.* v. *Phillips*, 274 U.S. 316 (1927). In that case, an injured seaman sued in admiralty for personal injuries and recovered an amount for damages. The plaintiff's subsequent action in negligence for the same injuries was rejected. The Court ruled that there is but one wrong and one recovery for that wrong. Given that the plaintiff was compensated for his injuries, he was entitled to no more.[7]

Accordingly, the very nature of compensatory damages and the underlying theory of the collateral source rule compel the conclusion that National Distillers not be required to pay plaintiff directly any amount that exceeds 100% of the injuries suffered by plaintiff. To require National Distillers to pay any additional compensation is an unconstitutional taking of National Distillers' property.

The payment of excessive compensation also unconstitutionally deprives National Distillers of equal protection of the laws. United State Constitution, Fourteenth Amendment. The lack of a set-off of worker's compensation payments clearly discriminates against complying employers, particularly complying self-insured employers. Whereas the complying self-insured employer directly pays the injured employee not only compensatory damages but also worker's compensation, the complying State Fund employer pays only the compensatory damages. The worker's compensation in that instance is not paid by the employer but out of the State insurance fund.

Similarly, the complying self-insured employer is required to pay more than would an individual tortfeasor who com-

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[7] The Court's analysis of res judicata in *Baltimore Steamship Co.* is fully supportive of National Distillers' first Reason for Granting the Writ, discussed *supra*.

mits precisely the same intentional tort. Most surprising of all, the complying self-insured employer must pay more than his non-complying counterpart due to the operation of Ohio Revised Code Sections 4123.75 and 4123.77. Thus, there is no question that the complying self-insured employer receives different and harsher treatment under Ohio law than those who commit the same act.

The United States Supreme Court has framed the equal protection issues in cases involving worker's compensation:

> The tests to determine the validity of state statutes under the Equal Protection Clause have been variously expressed, but this Court requires, at a minimum, that a statutory classification bears some rational relationship to a legitimate state purpose.

Weber v. *Aetna Casualty & Surety Co.*, 406 U.S. 164, 172 (1972).

Ohio has classified complying self-insured worker's compensation employers in a discriminatory manner that requires them to pay more in compensation than every other classification. In particular, there can be no rational reason to punish a complying employer by requiring payment of excessive compensation while simultaneously rewarding an employer who does not comply by allowing lesser payments. Surely, Ohio cannot have a significant state interest in *discouraging* compliance with its worker's compensation laws. *Jones* certainly provides no explanation for such disparate treatment. Therefore, National Distillers is unconstitutionally deprived of the equal protection of the laws to which it is entitled.

The obvious solution to these constitutional dilemmas is to permit a set-off of the payments made by a complying self-insured worker's compensation employer against compensatory damages. Such a set-off received constitutional approval in *Richardson* v. *Belcher*, 404 U.S. 78 (1971). In that case, a socal security recipient's benefits were later reduced

by the amount he received for worker's compensation. The Court rejected his claim that the set-off deprived him of substantive due process.[8]

In sum, as a complying self-insured employer under Ohio's worker's compensation system, National Distillers has been unconstitutionally deprived of its property without due process of law and denied equal protection of the laws. Therefore, this Court should issue a writ of certiorari to review these important constitutional questions.

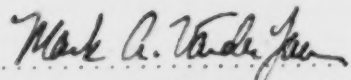
---

[8] The dissent by Mr. Justice Douglas highlights the very equal protection argument raised by National Distillers. Under the social security statute in question, there would have been no set-off if there was a self-insured employer. 404 U.S. at 85-86. Unfortunately, the majority refused to consider this issue since it was not raised by the facts. 404 U.S. at 84.

CONCLUSION

The Sixth Circuit's decision highlights critical issues in dire need of resolution by this Court. By virtue of diversity jurisdiction, the federal courts have become part of the state law process of depriving employers of due process and equal protection in intentional tort litigation. Even more compelling, the federal judiciary has become directly involved in state efforts to endorse the pursuit of diametrically contradictory claims. For all of these reasons, this Court should issue a writ of certiorari to review and reverse the decision of the Sixth Circuit.

Respectfully submitted,



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APPENDIX

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court. This notice is to be *prominently* displayed if this decision is reproduced.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 84-3222

PATRICIA L. PRATT,
Plaintiff-Appellant,

v.

NATIONAL DISTILLERS AND CHEMICAL CORPORATION, dba EMERY INDUSTRIES,
Defendant-Appellee.

ORDER
(Filed May 9, 1985)

BEFORE: ENGEL and JONES, Circuit Judges; and EDWARDS, Senior Circuit Judge.

Plaintiff appeals the summary judgment for defendant in this diversity action alleging wrongful death. On April 17, 1984, this Court entered an order suspending activity on appeal pending the Ohio Supreme Court's ruling in *Gains* v. *Webster Manufacturing Co.*, Case No. 9-258 (11th App. Dist. of Ohio Jan. 8, 1984). Plaintiff now moves for *sua sponte* reversal of the district court's judgment based upon the Ohio

Supreme Court's decision in *Gains* in the consolidated case entitled *Jones* v. *VIP Development Co.*, 15 Ohio St. 3d 90, 472 N.E.2d 1046 (1984). The appeal has been referred to a panel of this Court pursuant to Sixth Circuit Rule 9(a). Upon examination of the record and the parties' memoranda, the panel agrees unanimously that oral argument is not needed. Rule 34(a), Federal Rules of Appellate Procedure.

In a diversity action, the federal court must apply state law as expressed by the highest state court. *Coleman* v. *Western Electric Co.*, 671 F.2d 980 (6th Cir. 1982). The district court specifically found that the Ohio Supreme Court had not ruled on the issue of whether acceptance of workers' compensation benefits precluded a tort action against the plaintiff's employer. The Ohio appellate case that the district court relied on in finding that the tort suit was barred has now been reversed by the Ohio Supreme Court. This Court must apply state law as it stands when the case is on appeal, not as it stood when the case was decided in the district court. *Awrey* v. *Progressive Casualty Insurance Co.*, 728 F. 2d 352 (6th Cir. 1984); *see Foster* v. *Caterpillar Tractor Co.*, 714 F.2d 654 (6th Cir. 1983). It is now Ohio law that an injured employee may sue his employer for an intentional tort after accepting workers' compensation benefits for the same injury. *See Jones* v. *VIP Development Co., supra.*

Defendant argues that it is improper to *sua sponte* reverse without allowing it an opportunity to brief the issues. This argument is not persuasive. The only issue on appeal is whether Ohio law allows a tort action against an employer after the worker has accepted workers' compensation benefits. Defendant has had ample opportunity to address this issue and in fact has filed three memoranda in opposition to the motion. Defendant was free to fully address the issue in these memoranda.

Defendant also claims that *sua sponte* reversal is improper because three issues were left unresolved by the Ohio Supreme Court in *Jones*. These issues are estoppel, the con-

stitutional implications of a double recovery by plaintiff, and damages. Defendant can raise these issues in the district court on remand.

Therefore, it is ORDERED that plaintiff's motion for *sua sponte* reversal is granted to the extent that the district court's judgment is vacated and the case is remanded for further proceedings in light of *Jones* v. *VIP Development Co.*, *supr*. Sixth Circuit Rule 9(d).

ENTERED BY ORDER OF THE COURT
/s/ JOHN P. HEHMAN,
Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 84-3222

PATRICIA L. PRATT,
Plaintiff-Appellant,

v.

NATIONAL DISTILLERS AND CHEMICAL CORPORATION, dba EMERY INDUSTRIES,
Defendants-Appellees.

ORDER
(Filed April 17, 1984)

This cause comes before the court upon the motion of the appellant for an order suspending further activity before this court pending resolution by the Ohio Supreme Court of motions to certify filed in the cases of *Emalene Gains* v. *Webster Manufacturing Company* (No. 84-339) and *Hamlin* v. *Snow Metal Products,* (No. 84-409).

The court has considered the motion and memorandum in support and the response of the appellee thereto. Finding the motion well taken;

It is ORDERED that this cause be, and it hereby is, held in abeyance pending further order of the court. It is further ORDERED that appellant file with the court status reports every three months, commencing July 1, 1984, on the status of the litigation in the Ohio Supreme Court.

ENTERED BY ORDER OF THE COURT

JOHN P. HEHMAN, Clerk
/s/ LEONARD GREEN
By: Leonard Green
Chief Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESERN DIVISION

C-1-83-249

PATRICIA L. PRATT,

Plaintiff

v.

NATIONAL DISTILLERS AND CHEMICAL CORPORATION, dba EMERY INDUSTRIES,

Defendant

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT (Doc. No. 12)
(Filed February 22, 1984)

This matter is before the Court on defendant's Motion for Summary Judgment (Doc. No. 12). Defendant argues that plaintiff[1] cannot maintain a cause of action for an intentional tort after having accepted workers' compensation benefits.

The pertinent facts may be briefly stated. Plaintiff's husband was injured in a chemical explosion in defendant's plant on February 18, 1982. He died on March 16, 1982.

In the weeks between his injury and his death, plaintiff's husband received workers' compensation benefits and payment for his medical expenses. After her husband's death, plaintiff received funeral expenses and death benefits under workers' compensation.

---

[1] Plaintiff sues as surviving spouse and administratrix of the estate of her late husband, who died as a result of injuries sustained in an explosion in defendant's plant.

On February 17, 1984, plaintiff filed this lawsuit, alleging that her husband's injuries and death resulted from an intentional tort by defendant. Defendant has moved for summary judgment, arguing the plaintiff may not maintain a lawsuit after having accepted workers' compensation benefits.

The general rule in diversity cases is that a federal court must apply the law as expressed by the highest court of the state. *Coleman* v. *Western Electric Co.*, 671 F.2d 980, 983 (6th Cir. 1982); *Clutter* v. *Johns-Manville Sales Corp.*, 646 F.2d 1151, 1153 (6th Cir. 1981). However, if the highest court of the state has not spoken, the federal court must ascertain what the state law is and apply it. *Id.* A principle announced by a state appellate court is an indicator for ascertaining state law and should not be ignored by a federal court unless other indicators suggest that the state's highest court would decide otherwise. *Id.*

The election of remedies question presented by this case has not been squarely addressed by the Supreme Court of Ohio. In *Blankenship* v. *Cincinnati Milacron Chemicals, Inc.*, 69 Ohio St.2d 608, 433 N.E.2d 572 (1982), that Court held that Ohio's constitutional and statutory provisions establishing workers' compensation[2] did not preclude an employee from enforcing his common law remedies against his employer for an intentional tort. Although the plaintiffs in *Blankenship* were in fact receiving or seeking workers' compensation benefits, *see, Blankenship* v. *Cincinnati Milacron Chemicals, Inc.*, No. C-790768 (1st App. Dist. Jan. 14, 1981), Slip op. at 3, the Supreme Court was not presented with, nor did it address, the question of whether a worker must choose between workers' compensation and a suit for an intentional tort.

Similarly, that question was left unanswered in *Nayman*

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[2] Ohio Constitution, Section 35, Article II and Ohio Rev. Code §§ 4123.74 and 4123.741 were at issue.

v. *Kilbane*, 1 Ohio St.3d 269 (1982). *Nayman* also involved a suit for an intentional tort. The plaintiffs were receiving workers' compensation benefits and, in contrast to *Blankenship*, that fact was specifically set forth in the *Nayman* decision. Defendants in *Nayman* argued that the trial court lacked jurisdiction, because the suit was barred by the workers' compensation statutes. They filed a Complaint seeking a Writ of Prohibition, which the state Court of Appeals dismissed.

In affirming *per curiam*, the Supreme Court stated, "In view of this court's position as announced in *Blankenship*, it is clear the common pleas court does possess general subject matter jurisdiction. . ." *Id.* at 271. The court went on to say that its holding was "confined to the mere proposition that the common pleas court possesses the jurisdiction to review [plaintiff's] cause to determine whether a cognizable claim exists." *Id.*

This Court can discern no definitive resolution of the election of remedies issue in the foregoing pronouncements.[3] Accordingly, it proceeds to an examination of other indicators.

One Ohio Court of Appeals has held that a worker must elect between receiving workers' compensation benefits and filing a lawsuit alleging an intentional tort, and that choosing the former course bars the latter. *Gains* v. *Webster Manufacturing Co.*, Case No. 9-258 (11th App. Dist. Jan. 8, 1984).

---

[3] It is worthy of note, however, that Justice Holmes of the Supreme Court of Ohio, dissenting in *Nayman*, did directly confront the election issue. Pointing out that plaintiff had filed for and received workers' compensation benefits, Justice Holmes argued that "it should be held that this employee either had waived, or should be estopped from, bringing a civil action . . . alleging the commission of an 'intentional tort' by his employer." *Id.* at 272 (Holmes, J., dissenting).

Relying on the Supreme Court's analysis in *Blankenship*,[4] the *Gains* court concluded that an injured worker could not seek redress both under the theory that his injury occurred in the course of his employment (worker's compensation) and under the theory that it occurred outside the course of his employment (intentional tort.) The court therefore held that an injured worker must choose between the two remedies.[5]

This Court concurs in the analysis and reasoning in *Gains*. The Court notes that the same analysis was recently employed by Judge Robert M. Duncan of this Court in granting a Motion for Summary Judgment on facts identical in all pertinent respects to those at bar. *Ritchie* v. *Dravo Corp.*, No. C-2-82-1163 (S.D. Ohio Feb. 2, 1984) (Memorandum and Order).[6]

The summary judgment standard in this Circuit is a stringent one. Federal Rule of Civil Procedure 56(c) permits the Court to grant summary judgment only when there is no

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[4] The *Blankenship* holding was based on a distinction between an injury sustained "in the course of and arising from" employment, compensable under worker's compensation, and an injury sustained as a result of an intentional tort. The Court reasoned that the latter "is clearly not an 'injury' arising out of the course of employment." *Blankenship, supra,* at 613 n. 8.

[5] The only other Ohio Court of Appeals to address this issue has stated that "an employee is not estopped nor is he precluded from seeking monetary damages [for an intentional tort] merely because he has filed for and received workers' compensation benefits." *Hamlin* v. *Snow Metal Products,* No. 46229 (8th App. Dist. Jan. 5, 1984), Slip Op. at 21. The precise issue in *Hamlin* was whether the trial court erred in refusing to admit plaintiff's Bureau of Workers' Compensation records during trial of his intentional tort lawsuit against his employer.

[6] It should be noted in passing that Judge Duncan's expertise in dealing with Ohio law includes service as a Justice of the Ohio Supreme Court.

genuine issue of material fact and when the moving party is entitled to judgment as a matter of law. *Sartor* v. *Arkansas Natural Gas Corp.*, 321 U.S. 620 (1944); *Watkins* v. *Northwestern Ohio Tractor Pullers*, 630 F.2d 1155, 1158 (6th Cir. 1980).

The Court finds that there exists no genuine issue of material fact. Based on the foregoing authority, the Court further finds that defendant is entitled to judgment as a matter of law.

Accordingly, defendant's Motion for Summary Judgment (Doc. No. 12) must be and is hereby GRANTED.

IT IS SO ORDERED.

/s/ CARL B. RUBIN
Chief Judge
United States District Court

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Fifth Amendment, in pertinent part:

No person shall . . . be deprived of life, liberty, or property, without due process of law. . . .

United States Constitution, Fourteenth Amendment, in pertinent part:

Section 1. No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Ohio Constitution, Article II, Section 35, in pertinent part:

Such compensation shall be in lieu of all other rights to compensation, or damages, for such death, injuries, or occupational disease, and any employer who pays the premium or compensation provided by law, passed in accordance herewith, shall not be liable to respond in damages at common law or by statute for such death, injuries or occupational disease.

Ohio Revised Code Section 4123.74
§ 4123.74 Employer's liability in damages.

Employers who comply with section 4123.35 of the Revised Code shall not be liable to respond in damages at common law or by statute for any injury, or occupational disease, or bodily condition, received or contracted by any employee in the course of or arising out of his employment, or for any death resulting from such injury, occupational disease, or bodily condition occurring during the period covered by such premium so paid into the state insurance fund, or during the interval of time in which such employer is permitted

to pay such compensation directly to his injured employees or the dependents of his killed employees, whether or not such injury, occupational disease, bodily condition, or death is compensable under section 4123.01 to 4123.94, inclusive, of the Revised Code.

Ohio Revised Code Section 4123.75

§ 4123.75 Remedy of employee against noncomplying employer.

Any employee whose employer has failed to comply with section 4123.35 of the Revised Code, who has been injured or has suffered an occupational disease in the course of his employment, which was not purposely self-inflicted, or his dependents in case death has ensued, may file his application with the industrial commission for compensation and the commission shall hear and determine such application for compensation in like manner as in other claims and shall make such award to such claimant as he would be entitled to receive if such employer had complied with section 4123.35 of the Revised Code. Payment of the claim shall be made promptly from the statutory surplus fund. Such payment shall not bar any action under section 4123.77 of the Revised Code. If a recovery is made in an action under section 4123.77 of the Revised Code any funds paid from the state insurance fund under this section shall be repaid by the claimant. The commission shall institute proceedings to recover from the employer any moneys paid from the surplus fund and to secure the employer's payment of the award. The employer shall pay such award in the manner and amount fixed thereby or shall furnish to the commission a bond, in such an amount and with such sureties as the commission requires, to pay such employee such award in the manner and amount fixed thereby.

Appeals and payment in a contested claim are governed by the provisions of Chapter 4123. of the Revised Code that

generally govern appeals to a regional board of review, the industrial commission, and the courts. In the event payments are made to a claimant which should not have been made under the final decision in the appeal of the claim, the amount of such payments shall be charged to the surplus fund created under division (B) of section 4123.34 of the Revised Code. In the event recovery is made from the non-complying employer, such sums as may be recovered shall be paid into the surplus fund.

If the employer fails to pay such compensation to the person entitled thereto, or fails to furnish such bond, within a period of ten days after notification of such award, the award shall constitute a liquidated claim for damages against such employer in the amount so ascertained and fixed by the commission, and the commission shall certify the same to the attorney general who shall forthwith institute a civil action against such employer in the name of the state for the collection of such award. In such action it shall be sufficient for plaintiff to set forth a copy of the record of proceedings of the commission relative to such claims as certified by the commission to the attorney general and to state that there is due to plaintiff on account of such finding and award of the commission a specified sum which plaintiff claims with interest. A certified copy of such record of proceedings in such claim shall be attached to the complaint and constitutes prima-facie evidence of the truth of the facts therein contained. Further proceedings shall be provided in the Rules of Civil Procedures. As soon as the issues are made up in any such case, it shall be placed at the head of the trial docket and shall be first in order for trial. The cause of action provided in this section and the cause of action provided by section 4123.37 of the Revised Code may be joined in one action against an employer, and the amount of any premium paid or recovered from such employer for the period not exceeding six months during which such injury or disease, or injury or disease resulting in death, occurred shall be credited against

the amount of any judgment for compensation recovered pursuant to this section. The amount recovered in such action from such employer shall be paid into the surplus fund created under division (B) of section 4123.34 of the Revised Code up to the amount paid out of the surplus fund and the balance into the state insurance fund. Any employee whose employer has elected to pay compensation to his injured employees or to the dependents of his killed employees in accordance with section 4123.35 of the Revised Code, in the event of the failure of his employer to pay such compensation or furnish such medical, surgical, nursing, and hospital services and attention or funeral expenses, may file his application with the commission for the purpose of having the amount of such compensation and such medical, surgical, nursing, and hospital services and attention or funeral expenses determined; and thereupon like proceedings shall be had before the commission and with like effect as provided in this section.

The commission shall adopt and publish rules governing the procedure before the commission provided in this section and shall prescribe the form of notices and the manner of serving the same in all claims for compensation arising under this section. Any suit, action, proceeding, or award brought or made against any employer under this section may be compromised by the commission, or such suit, action, or proceeding may be prosecuted to final judgment as in the discretion of the commission may best subserve the interests of the state insurance fund.

A final judgment against the employer recovered in the manner provided in this section entitles such claimant to the compensation provided in Chapter 4123. of the Revised Code, for such injury, occupational disease, or death and such compensation shall be paid from the surplus created by section 4123.34 of the Revised Code, and any sum recovered on account of such judgment shall be paid to the commission and credited to such fund as the commission designates.

Ohio Revised Code Section 4123.77

§ 4123.77 Common law defenses denied to noncomplying employers.

Employers mentioned in division (B)(2) of section 4123.01 of the Revised Code, who fail to comply with section 4123.35 of the Revised Code are not entitled to the benefits of section 4123.01 to 4123.94, inclusive, of the Revised Code, during the period of such noncompliance, but are liable to their employees for damages suffered by reason of personal injuries sustained in the course of employment caused by the wrongful act, neglect, or default of the employer, or any of the employer's officers, agents, or employees, and also to the personal representatives of such employees where death results from such injuries, and in such action the defendant shall not avail himself or itself of the following common law defenses:

(A) The defense of the fellow service rule;
(B) The defense of the assumption of risk;
(C) The defense of contributory negligence.

Such employers are subject to sections 4123.37 and 4123.75 of the Revised Code.

Supreme Court, U.S.
F I L E D
SEP 6 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-207

In The
Supreme Court of the United States
October Term, 1985

NATIONAL DISTILLERS &
CHEMICAL CORPORATION,
Petitioner,

v.

PATRICIA L. PRATT,
Respondent.

BRIEF IN OPPOSITION TO "PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT"

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QUESTIONS PRESENTED

1. The only issue raised in the Trial Court and on Appeal to the United States Court of Appeals for the Sixth Circuit, was whether Ohio law permits the estate of a deceased worker whose death was intentionally and maliciously caused by his employer, to pursue an intentional tort action against the employer after the employee and the surviving spouse have received workers' compensation benefits.

2. No issue relating to the United States Constitution or other Federal question, was determined by the courts below, and the United States Court of Appeals for the Sixth Circuit expressly held that any claimed constitutional issues, or other issues in this case, could be raised in the District Court, on remand.

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STATEMENT OF THE CASE

Plaintiff-Respondent, Patricia L. Pratt, is the widow and administratrix of the estate of her late husband, Paul W. Pratt, who had been employed by the Defendant-Petitioner, National Distillers & Chemical Corporation, dba Emery Industries. On February 18, 1982, Mr. Pratt sustained second and third degree burns over 80% of his body in an explosion and flash fire that was intentionally and maliciously caused by his employer, the Petitioner. He died approximately six weeks later as a result thereof.

This action was filed in the United States District Court for the Southern District of Ohio, on February 17, 1983, solely on the basis of diversity jurisdiction. No questions of Federal law were alleged. Ohio law allows an action by an employee against an employer for damages caused by the intentional and malicious wrongful acts of the employer. On October 31, 1983, the Defendant filed its Motion for Summary Judgment claiming that Ohio law did not permit an intentional tort action to be maintained by the estate when the worker and his surviving spouse have received workers' compensation benefits. The Motion was granted by the Trial Court on February 22, 1984.

On Appeal to the United States Court of Appeals for the Sixth Circuit, the decision of the Trial Court was reversed on May 9, 1985. The decision of the Sixth Circuit Court of Appeals was based on *Jones v. VIP Development Co.,* 15 Ohio St. 3d 90, 472 N.E. 2d 1046 (1984), wherein the Supreme Court of Ohio directly held that a worker who has received workers' compensation benefits may also maintain a common law action against the employer based on an intentional tort.

REASON FOR DENYING THE WRIT

The Decisions Below Rest Solely Upon Ohio Law As Recently Determined By The Supreme Court Of Ohio, And No Federal Question Was Determined.

The United States Court of Appeals for the Sixth Circuit expressly stated that the only issue to be determined on appeal was one of Ohio law:

> ".... The only issue on appeal is whether Ohio law allows a tort action against an employer after the worker has accepted workers' compensation benefits." (3A).

The Court held that:

> ".... It is now Ohio law that an injured employee may sue his employer for an intentional tort after accepting workers' compensation benefits for the same injury. See *Jones v. VIP Development Co., supra.*" (2-3A).

The Court also indicated that any other issues of estoppel, or constitutional implications of a double recovery by the Plaintiff, and damages, could be raised by the Defendant in the District Court. (3A).

We respectfully submit that there having been no determination of a question of Federal constitutional or statutory law in the courts below, there is no "special" or "important reason" for this Court to grant the Defendant's Petition for a Writ of Certiorari.

———o———

CONCLUSION

For the foregoing reasons, we respectfully submit that Defendant's Petition for a Writ of Certiorari should be denied, and this matter should be remanded to the District Court for further proceedings.

Respectfully submitted,

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Attorneys for Respondent
Patricia L. Pratt

APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 84-3222

PATRICIA L. PRATT,

Plaintiff-Appellant,

v.

NATIONAL DISTILLERS AND CHEMICAL CORPORATION, dba EMERY INDUSTRIES,

Defendant-Appellee.

O R D E R

(Filed May 9, 1985)

BEFORE: ENGEL and JONES, Circuit Judges; and EDWARDS, Senior Circuit Judge.

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In a diversity action, the federal court must apply state law as expressed by the highest state court. *Coleman v. Western Electric Co.*, 671 F.2d 980 (6th Cir. 1982). The district court specifically found that the Ohio Supreme Court had not ruled on the issue of whether acceptance of workers' compensation benefits precluded a tort action against the plaintiff's employer. The Ohio appellate case that the district court relied on in finding that the tort suit was barred has now been reversed by the Ohio Supreme Court. This Court must apply state law as it stands when the case is on appeal, not as it stood when the case was decided in the district court. *Awrey v. Progressive Casualty Insurance Co.*, 728 F.2d 352 (6th Cir. 1984); *see Foster v. Caterpillar Tractor Co.*, 714 F.2d 654 (6th Cir. 1983). It is now Ohio law that an injured employee may sue his employer for an intentional tort after accepting

workers' compensation benefits for the same injury. *See Jones v. VIP Development Co., supra.*

Defendant argues that it is improper to *sua sponte* reverse without allowing it an opportunity to brief the issues. This argument is not persuasive. The only issue on appeal is whether Ohio law allows a tort action against an employer after the worker has accepted workers' compensation benefits. Defendant has had ample opportunity to address this issue and in fact has filed three memoranda in opposition to the motion. Defendant was free to fully address the issue in these memoranda.

Defendant also claims that *sua sponte* reversal is improper because three issues were left unresolved by the Ohio Supreme Court in *Jones*. These issues are estoppel, the constitutional implications of a double recovery by plaintiff, and damages. Defendant can raise these issues in the district court on remand.

Therefore, it is ORDERED that plaintiff's motion for *sua sponte* reversal is granted to the extent that the district court's judgment is vacated and the case is remanded for further proceedings in light of *Jones v. VIP Development Co., supra.* Sixth Circuit Rule 9(d).

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN,
Clerk